(1) Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

JESUSA MORALES,

Petitioner,

v.

THE P.F. LABORATORIES, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the courts reject precedent under *Hines* and later cases and dismiss a falsely accused employee's complaint for wrongful discharge and breach of the Union's duty of fair representation under 12 (b) (6), notwithstanding that at arbitration, the Union unfairly and improperly deprived petitioner and the arbitrator of evidence of her innocence and the arbitrator concluded that the Union did not present any evidence?

2. Under notice pleading, when the claim is that the Union's omissions tainted the outcome of the arbitration, is the complaint sufficient if it alleged that the Union breached its duty at arbitration by failing to present favorable and exculpatory evidence, to her prejudice, and that a different result would have been obtained if the Union had "properly and fairly" represented her?

3. If the complaint was insufficient, was dismissal with prejudice the proper remedy?

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REASONS FOR GRANTING THE PETITION

A ruling is needed to reaffirm *Hines* and *Czosek*, and to clarify what words need to be pleaded, to insure uniformity, as LMRA § 301 authorized development of federal common-law rules to avoid potentially inconsistent judicial interpretations of collective–bargaining terms. *Livadas v. Bradshaw,* 512 U.S. 107, 114 S.Ct. 2068, 129 L.Ed.2d (1994), at 121-122, 2077 (citations omitted.)

1. The rulings below depart from the long-settled doctrine of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 96, S.Ct. 1048, 47 L.Ed.2d 231 (1976) and later cases, granting a remedy when a Union's conduct causes grievance mechanisms to fail, and where the test is whether the union's conduct contributed to the erroneous result, negligence, poor judgment and disagreements over strategy are not the standards to apply. 12

2. The opinions below did not take as true the allegations and all reasonable inferences that could be drawn, nor did they construe the complaint in the light most favorable to the employee, and where the District Court never looked at whether there were sufficient facts from which bad faith or arbitrary union conduct could be inferred, the Court of Appeals should have remanded to allow the District Court to make those findings. 19

3. As "primary guardians of the duty of fair representation," under *Czosek v. O'Mara,* the courts should have construed the complaint to avoid dismissal and, if defective, "at the very least" given plaintiff the opportunity to amend the pleadings.....21

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Appendix A - Memorandum Opinion of the United States Court of Appeals for the Third Circuit, dated July 17, 2001 ..... 1a

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OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit, entered July 17, 2001, is set forth in the Appendix at 1a.

The Judgment of the United States District Court, District of New Jersey is set forth in the Appendix at 9a.

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Third Circuit, affirming the District Court of the District of New Jersey, was entered July 17, 2001. This petition for a writ of certiorari is filed within ninety (90) days of that date, pursuant to 28 U.S.C. § 2101 (c).

The jurisdiction of this Court is predicated upon 28 U.S.C. § 1254 (1).

Jurisdiction of the United States District Court, District of New Jersey, was predicated on 29 U.S.C. § 185.

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act, 1947, § 301 - 29 U.S.C. § 185, § 185 (a)

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Jesusa Morales ("Morales") was a senior chemist in the Quality Control Laboratory ("QCL") at P.F. Laboratories ("P.F. Labs"). Morales had an exemplary service record of 29 years, and was a member of I.C.W.U., Local 825. P.F. Labs is a manufacturer of prescription and over-the-counter drugs, and is regulated by the Food and Drug Administration ("FDA") and Drug Enforcement Administration (DEA) and operates under the Code of Federal Regulations.

On August 20, 1998, without warning or discussion, P.F. Labs suspended Morales for allegedly shutting an instrument being used by another chemist. Morales was terminated on August 27, 1998.

On June 24, 1998, Morales went to a small lab area to take a phone call. The phone was on a wall at the left, and there were several instruments in the area, from left to right: a Spectrophotometer and printer ("Spectro"), a data-acquisition computer that generates error messages in the event of malfunctions, a high-pressure liquid chromatography pump and monitor [HLPC], and a new robotic Tablet Preparation Workstation [TPW-II] and computer. Three co-workers were in the area when Morales took the call: her husband, Jose Morales, Brana Micic and Victoria Deftalinska. The three were trying to operate the Spectro, and Jose asked Morales to help them. When she ended her call, she said she could not help them because she was unfamiliar with the instrument and left the room.

The Spectro was not involved. The other instruments were interconnected and allegedly being used by another

chemist, John Spingler, who was not in the area when the group was there. At about 2:10 p.m. on that day, Spingler experienced a malfunction with the equipment.

After several incidents of alleged sabotage, meetings were held with the QCL staff, and P.F. Labs hired outside investigators, Kroll Associates, to look into the matter.

According to written statements, Deftalinska told Kroll that three weeks after the meetings, Micic first told her that she saw Morales shut a switch in the lab area and not to tell anyone. The allegation was uncorroborated by Deftalinska and Jose Morales. Another co-worker told investigators that Micic told her she saw Morales shut the switch on the TPWII. Micic initially told investigators she knew nothing about the incident. On July 30, 1998, she told them she saw Morales shut a switch. When asked whether she noticed any effect, she said, "No," and that she did not even know whether the instrument was running. She said the group then went on the 2:45 p.m. break.

Morales was terminated, and a grievance process ensued. The case proceeded to arbitration, which was held March 24, April 29 and May 25, 1999. During the grievance meetings, Morales was charged with having shut the TPW-II. However, at arbitration, the charge was changed, and instead, she was accused of having shut the HLPC.

The union called the charge a fabrication and protested Morales' innocence. At arbitration, Spingler testified that when he noticed the problem, he went to the lab area and shut off the TPW-II himself. He also testified that the TPW-II had been validated for use. The union did not call any witnesses to rebut the claim.

The arbitrator granted the union's request to observe the machinery. A demonstration of the equipment was held on May 4, 1999. The Chief Shop Steward was to testify on favorable findings, indicating that the HPLC could not have been touched, because when shut off during the reenactment, the result was incompatible with what Spingler had reported.

Inexplicably, however, the Chief Shop Steward was never called as a witness, and the Union allowed the arbitration to conclude on May 25, 1999, without his testimony. For no apparent reason, the Union did not call another key witness.[1]

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[1] At the arbitration, much time was spent discussing an alleged tampering incident with which Morales had no connection. Without objection, the Employer introduced into evidence a letter written by another chemist, Samir Michael, telling management that he feared for his safety because the air had been shut during a gas chromatography run, leaving exposed hydrogen, which, if ignited, would likely cause "an explosion strong enough to kill me and damage the lab." (Appendix E, 46a-47a) Company and Union officials testified about the letter and potential consequences of sabotage, including injuries and deaths, harm to the public and the possible shutdown of a manufacturing operation by the FDA. Based on this, the arbitrator decided not to apply the rule under which employees with long service records are not terminated for a first offense, or use a standard of "beyond a reasonable doubt," even though there were no such consequences in this case. (The Arbitrator's discussion of public safety and FDA procedures is found at Appendix E, at 31a, 32a, 34a, 45a-52a.) The union never informed the arbitrator that Michael later admitted that he may have caused the hydrogen problem and was terminated by P.F. Labs on August 27, 1998. In her complaint, Morales alleged that the Union did not object to testimony regarding Michael and did not move for reconsideration or seek to have the award vacated under the "public safety" exception. [Am. Compl. ¶22, 24-26] on the ground that the arbitrator exceeded the scope of the CBA and

On September 7, 1999, the arbitrator upheld the discharge, finding that the Union had not submitted any evidence. (Appendix E, 51a-52a). The Union did not seek to have the award vacated, and Morales filed suit against P.F. Labs pursuant to 29 U.S.C. § 185 for breach of contract and breach of the Union's duty of fair representation (11a).

The complaint alleged that despite its duty to represent her "fairly," the Union did not present favorable witnesses and documentary evidence at arbitration [Am. Compl. ¶ 15] and findings of a demonstration showing that the incident that led to her discharge "never occurred," to her prejudice [¶ 16]; that the Union did not investigate the true cause of the malfunction or call a witness to rebut the Employer on the extent of harm alleged and the significance of the test allegedly disrupted [¶ 17-19]; did not challenge the Employer's claim that Morales had caused an FDA audit, and did not ask the arbitrator to use a higher standard of proof [¶ 18- 20] It concluded that the result would have been different had she been "properly and fairly" represented.

P.F. Labs sought dismissal, stating that Morales had not alleged that the Union's conduct was "arbitrary, in bad faith or discriminatory," and only alleged disagreements over tactics and strategy. In her brief, Morales cited the language, "dishonest, in bad faith or discriminatory," in *Hines,* 96 S.Ct. 1048, 47 L.Ed.2d 231, and argued that the arbitration was a sham and that the union's representation was inadequate and

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substituted his own notions of industrial justice. In her District Court brief, she appended documents showing that Michael had retracted the letter and was terminated, evidence that was omitted, to show that if presented, the arbitrator probably would not have relied on the letter and testimony in making his determination.

contributed to the erroneous outcome. Relying on *United Paperworkers Int'l v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 363, 98 L.Ed.2d 286 (1987), n. 8, at 369, for the proposition that discharges must stand or fall on the reason given at termination, she argued that the union took no action when the Employer changed the charge after termination. She stated that the Chief Shop Steward was to report favorable findings of the demonstration, but was not called, and appended letters showing that he was to testify.

On August 4, 2001, the District Court dismissed the complaint under Fed. R. Civ. P. 12 (b) (6), finding that because Morales had not alleged that the Union's conduct was "arbitrary, discriminatory or in bad faith," a "necessary element," she had not stated a §301 claim with regard to the Union's representation or the integrity of the arbitration, and only alleged ways she believed her case should have been presented, and "mere disagreements over tactics and strategy." (14a-15a). The District Court found that she challenged only her representation at arbitration (17a) and "mainly argues that the Arbitrator made erroneous factual determinations." It stated that her "attacks on the arbitration process are indirect, couched in her allegations that the Union breached its duty to fairly represent her, and that she alleges that the Union's failure to fairly represent her contravenes public policy," (16a). [2] The Court noted that she opposed dismissal but did not seek leave to amend. (13a)

On appeal, Morales argued that she had pleaded the necessary element of unfair representation and that the

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[2] The complaint stated that the Union had not sought to have the award vacated. [¶ 24-26] The District Court apparently took this to mean that Morales was asking it to vacate the award.

District Court had not recognized the distinctions between mere negligence and gross inaction or mistake in *Hines* and later cases where employees were falsely accused and the union presented no evidence to rebut the employer's. *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998); *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994) She argued that omission of evidence showing that the incident that led to her discharge "never occurred," to her prejudice, was sufficient to state a claim that the proceeding was tainted, and that beyond pleadings, her claim was substantiated by the arbitrator's finding that the Union submitted no evidence and P.F. Labs' argument in it post-arbitration brief, that her "only defense...was her unsubstantiated denial."

In her reply brief, Morales argued that withholding exculpatory evidence warranted reversal under *Hines*, that the union had not rebutted the employer's evidence, that the arbitrator did not have the essential facts before him, and that the union could have discovered the true cause of the malfunction and whether the TPW-II was operational, with a minimum of investigation. [3]

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[3] She discussed documents submitted to the District Court that were in the union's possession but not used in its presentation, i.e., Jose Morales' written statement to investigators that after the malfunction, Spingler accused him of having shut the TPW-II, to show what occurred immediately after the malfunction and that it was the TPW-II that was at issue before the discharge, not the HPLC, as Spingler later testified. The statement also contradicted Spingler's testimony that he himself shut the TPW-II, which touched on his credibility, and threshold questions, such as the infirmity of the charge, why it was changed, Morales' right to know what she was charged with, and the integrity of the arbitration proceeding.

On July 17, 2001, the Court of Appeals affirmed, holding that the District Court had found that Morales had not alleged any facts to support a claim of unfair representation; that dismissal for failure to allege inadequate representation was proper (4a), and that she had not alleged arbitrary, discriminatory, bad faith or perfunctory conduct or that the arbitration was a sham, or even made allegations that would support such a claim. It rejected the claim that the union withheld findings that would have changed the outcome, holding that the decision not to submit evidence or witnesses was properly construed as strategic (3a), and that even if it was the result of negligence or poor judgment, that would not establish unfair representation (3a-4a). It held that the District Court was not bound to follow *Hines* or other cases Morales cited, where there was evidence of bad faith or perfunctory conduct, i.e., *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998), (union made "little effort to rebut" company's evidence) as they were not on point. (4a)

The District Court Opinion

The District Court did not recognize that Morales was alleging that the union tainted the outcome of the arbitration, or sham, and therefore did not apply the proper test. The test is whether the employee was prejudiced by omissions of favorable evidence and whether it was probable that the evidence would have changed the outcome. To the extent that the complaint alleged that the union withheld favorable evidence, to her prejudice, and that a different

result would have been obtained if she had been fairly represented, it adequately stated the claim and should not have been dismissed. In addition, the District Court never reached the allegations and other submissions to determine whether there were sufficient facts from which bad faith or arbitrary conduct could be inferred. The only comment it made was on her allegation that the union did not seek have award vacated under the public safety exception and other grounds, which were secondary issues. (16a-17a) It grounded dismissal solely on Morales' failure to use the words "arbitrary, in bad faith or discriminatory." Since the District Court never proceeded to these determinations, it did not take as true the allegations and any inferences that could be drawn from them. As such, the complaint was not construed in the light most favorable to her. [4]

The Third Circuit Opinion

In ruling that the District Court was not bound to follow *Hines* and other cases, the Court of Appeals abandons stare decisis and deviates from long-established precedent,

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4 The District Court also erred in finding that Morales' "attacks on the arbitration process are indirect, couched in allegations that the Union breached its duty to fairly represent her (16a), since that is what LMRA § 301 requires. Where employees attacked the award directly, rather than alleging a union breach, it resulted in dismissal. *Abernathy v. United States Postal Service*, 740 F.2d 612 (8th Cir. 1984), at 618. The court also contradicted that finding when it said that Morales "mainly argues that the Arbitrator made erroneous factual determinations." Morales merely stated grounds on which the union could have sought to have the award vacated, and that the union chose not to.

followed in the other circuits, granting employees a remedy where a union's conduct has caused grievance mechanisms to fail. As such, the opinion produces a result inconsistent with those of the Supreme Court and other circuits.

To the extent that there is no authority for the proposition that omitting exculpatory evidence amounts to negligence, poor judgment, or disagreements over strategy, the Court of Appeals essentially enunciates its own rule.

Neither does the Court of Appeals provide any basis for finding that *Hines* and *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998) are not on point, since they also involved employees terminated based on false charges whose unions provided no evidence on their behalf.

As a matter of procedure, the allegations were not taken as true and the complaint was not construed in the light most favorable to Morales. The only comment was on the lesser allegation that the union did not seek to have the award vacated based on Morales' long tenure. The Court of Appeals found that the arbitrator did consider Morales' long service record. (4a-5a) But given that he decided not to apply the rule against terminating long-term employees for first offenses based on his own public safety findings (49a-50a), this was a reasonable ground on which the union could have sought to vacate. As such, the opinion deviates from the standard practice of construing LMRA § 301 claims to avoid dismissal and granting plaintiffs the opportunity to amend. Finally, where the District Court made no findings on whether there were sufficient facts from which bad faith or arbitrary conduct could be inferred, the Court of Appeals should have remanded to allow it to make those determinations.

ARGUMENT

1.The rulings below depart from the long-settled doctrine of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 96, S.Ct. 1048, 47 L.Ed.2d 231 (1976) and later cases, granting a remedy when a union's conduct causes grievance mechanisms to fail, and where the test is whether the union's conduct contributed to the erroneous result, negligence, poor judgment and disagreements over strategy are not the standards to apply.

In a hybrid case that is based on an arbitration award, the ultimate issue is whether the union's conduct contributed to the erroneous decision. 48A Am. Jur. 2d Labor and Labor Relations, § 3322, at 510.

As the Supreme Court has clearly explained in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568, 96 S. Ct 1048, 1055, 1058 (1976):

> "Once the grievance processes have been utilized, the focus is no longer on the reasons for the union's failure to act, but whether, contrary to the arbitrator's decision, there was a breach of contract and whether there is substantial reason to believe that a union's breach of duty of fair representation contributed to the erroneous outcome of the proceedings."[5]

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[5] In accordance with this rule, *Am. Jur.* prepares one pleading form for when a union refuses to process a grievance that includes the language "arbitrary, discriminatory or in bad faith," and another form for when the union's conduct taints the arbitration, No. 113, which does not include that language, and which was used as a guide for Morales' complaint. See *Am. Jur, Pleading and Practice Forms, Vol. 16, 1991*, at 102-105.

Thus, an employee can bring a claim under LMRA § 301 if the arbitration was a sham. 48A Am. Jur. 2d Labor and Labor Relations § 3206, at 460, citing *Hines*.

The Third Circuit has clearly recognized this rule. In *Vosch v. Werner Continental, Inc.*, 734 F.2d 149, 154 (3d Cir. 1984), the court held that employees can obtain review of an adverse arbitral decision if they can show either union conduct that is "arbitrary, discriminatory or in bad faith," or that the grievance procedure was a "sham, substantially inadequate or substantially unavailable."

More recently, the Court of Appeals for the Tenth Circuit held that the employee must prove some conduct by the union that breached the duty of fair representation and a causal connection showing that the breach affected the integrity of the arbitration process. *Webb v. ABF Freight System, Inc.*, 155 F.3d 1230 (10th Cir. 1998), at 1239.

In *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994), the Court of Appeals for the Sixth Circuit holds that the employee must show discrimination, bad faith or extreme arbitrariness, and that the breach of duty tainted the hearing panel's decision, at 585. The impact of the breach on the outcome must be substantial, and plaintiff must prove that the grievance process was "seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct. *Id*

The distinctions between negligence and poor judgment and conduct constituting a breach were also discussed in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S.

554, 558-559, 560, 96 S. Ct 1048, 1055, 1058 (1976). While negligence and poor judgment will not support a breach, an employee will be allowed to relitigate on a showing of "bad faith, dishonesty of purpose or such gross mistake or inaction as to imply bad faith" on the part of the union. *Id.*, n.5, at 560, citing *Balowski v. International Union* , 372 F.2d 829 (6th Cir. 1967)

In *Hines*, the union presented no evidence to contradict the employer's. The District Court found that the facts showed at most bad judgment. The Court of Appeals reversed, finding sufficient facts from which bad faith or arbitrary conduct could be inferred. *Id.*, 559.

In light of this, the Court of Appeals' view here that there would be no breach even assuming that the union was negligent in failing to present witnesses and evidence, is simply not supported by the weight of authority, as negligence is not the standard to apply.

Decisional law shows that a union's failure to consider documents that support an employee's claim constitutes "more than mere negligence." *Sudderth v. Alreco Metals, Inc.*, 839 F.Supp. 1267 (W.D. Mich. 1993), at 1273. Where a union's omissions "reflect reckless disregard" for the employee's rights, *DeFillippes v. The Star Ledger*, 872 F. Supp. 138 (D. N.J. 1994), at 141, or severely prejudice the employee, the policies underlying the duty of fair representation would not be served by shielding the union from liability. *Dutrisac v. Caterpillar Tractor Co.*, 511 F. Supp. 719 (1981), at 724. That view is echoed in Court of Appeals for the Third Circuit in *Findley v. Jones Motor Freight Div. Allegheny Corp.*, 639 F.2d 953, 958, 959-960 (3d Cir. 1981).

The standard of negligence was not applied in two cases where employees were terminated based on false charges and the union's representation tainted the outcome of the arbitration proceeding, *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994) and *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998). In *Black*, the employee was discharged for failing to report a damaged truck. The court found a breach where the Union representative failed to call the one witness who could have corroborated the employee's testimony that the truck was undamaged when he brought it in. At trial, the employer admitted that he would have reconsidered his decision based on that testimony. Thus, the court held that the testimony was "sufficiently significant that it would likely have altered the result" of the proceedings. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573 (6th Cir. 1994), at 579, 585. In *Schoonover*, the court held that the evidence supported a finding that the union's breach of duty contributed to the erroneous outcome because union representatives credited the employer's reenactment, refused to call an expert when they knew his testimony was crucial and therefore did not rebut the employer's evidence. *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998), at 491-497.

In *Tatum v. Frisco Transp.. Co.*, 626 F.2d 55, 58-59 (8th Cir. 1980), a breach was found on a showing that the arbitral process was seriously undermined by the union's failure to represent the employee. The Court of Appeals found that where the union did not call any witnesses, ignored obvious sources of proof, and did not present a statement showing his discharge violated the agreement, the omissions seriously prejudiced the injured employee's rights

and subverted the arbitral process. *Id.*, at 59. The Court did not specifically address "arbitrary, discriminatory, or bad faith conduct."

On the other hand, no taint will be found if the committee has heard "both sides of the story," and seen documents that refuted damaging statements against the employee. *Dushaw v. Roadway Exp., Inc.*, 66 F.3d 129 (6th Cir. 1995), at 132-133, where the employee said he had the opportunity to present all his arguments, and was satisfied with his representation. The Court of Appeals stated:

> "[I]n contrast to cases where missing evidence would cause the employer to reconsider the discharge, there was no evidence that the Union failed to present evidence likely to have brought about a different result." *Id.*

Similarly, in *Findley v. Jones Motor Freight Div. Allegheny Corp.*, 639 F.2d 953, 958 (3d Cir. 1981), the employee was able to present all his favorable evidence, but the grievance panel nevertheless upheld the discharge. The court could find no breach because the panel had all the essential facts before it, and there was nothing Findley could have added to improve his case, even if a court would have decided his grievance otherwise, at 959-961.

As the Supreme Court has made abundantly clear, a plaintiff will not succeed if he can show only slightly unreasonable conduct, and a union's conduct is arbitrary only if, in light of the factual and legal landscape at the time, it was "so far out side a wide range of reasonableness

as to be irrational, *Black v. Ryder/P.I.E. Nationwide, Inc.*, F.3d 573 (6th Cir. 1994), *Id..*, quoting *Air Line Pilots Assn. Int'l. v. O'Neill,* 499 U.S. 65, 67, 111 S.Ct (1991) at 1129.

Negligence is defined as conduct that is neither intentional nor reckless. *Walters v. Local Union No. 337*, 7 F. Supp.2d 885 (E.D. Mich.1998), at 894.

Despite this, one court has held that even negligent conduct constituted a breach. Where a union missed a time limit for submitting a grievance to arbitration, the court found the conduct to be arbitrary because the union had no rational reason not to submit it to arbitration. *Dutrisac v. Caterpillar Tractor Co.*, 511 F. Supp. 719 (1981), at 727, distinguishing from an erroneous interpretation of time limits, *Id.*, n. 4.

The most common examples of mere negligence are a union's erroneous interpretation of a rule, *Walters v. Local Union No. 337*, 7 F. Supp.2d 885 (E.D. Mich.1998), at 894, and omissions resulting from a union's reliance on a past practice, since these are based on wholly relevant consideration and are not intended to harm the employee. *Riley v. Letter Carriers Local,* 668 F.2d 224 (3rd Cir. 1981), at 228-229 (citations omitted.)

Pursuant to the above, the negligence standard has no application in cases where the union has failed to present favorable evidence.

Neither is there authority to support the holding that failure to submit favorable evidence amounts to disagreements over tactics and strategy. In the opinions below, reliance on *DeFillippes v. The Star Ledger*, 872 F. Supp. 138 (D. N.J. 1994), is misplaced because that case did

not deal with omissions of favorable evidence. In *DeFillippes*, the court found that all the issues were put before the arbitrator and fully considered, i.e., whether the discharge was pretextual and whether the employee received an adequate warning. The court also found that his attorney had objected to the admission into evidence of an office rule, so that the integrity of the arbitration had not been impugned and the proceeding was not a sham, at 141-142. For these reasons, the court found that the employee had alleged only disagreements over tactics and strategy.

It has also been held that a Union's reliance on the advice of counsel will not insulate it from liability for breach of its duty of fair representation. *Gregg v. Chauffeurs, Teamsters & Helpers U. Local*, 699 F.2d 1015 (9th Cir. 1983), at 1016-1017. The Court of Appeals reasoned that such a rule would virtually eliminate any remedy for arbitrary, discriminatory or bad faith action, as long as an attorney recommended such action. *Id.*, at 1017.

As noted in *Hines*, LMRA § 301 reflected Congress' interest in promoting a "higher degree of responsibility on the parties to such agreements." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct 1048, 1055 (1976), at 561. Part of the union's duty is to help the employee secure the materials necessary for a fair hearing and put forward the strongest arguments that could reasonably be made. *Walters v. Local Union No. 337*, 7 F. Supp.2d 885 (E.D. Mich. 1998), at 891, quoting *Olsen v. United Parcel Service*, 892 F.2d 1290, 1295 (7th Cir. 1990) And good-faith representation must be "sufficiently thorough so that the basic issues are presented in understandable fashion. The standards of minimally accepted conduct cannot be too lax if

they are to safeguard the employee whose rights are entrusted to the union and depend on its efforts in his behalf. *Findley v. Jones Motor Freight Div. Allegheny Corp.*, 639 F.2d 953, (3d Cir. 1981), at 959-961.

Finally, the opinions below err in finding that Morales failed to plead "inadequate" representation since, under *DelCostello v. International Brotherhood of Teamsters et. al.*, 462 U.S. 151, 170 (1983), duty of fair representation claims are allegations of "unfair, arbitrary, or discriminatory treatment." Since she presented facts, a complaint that was a recital of a sham arbitration, and stated that a different result would have been obtained had the union represented her "fairly and properly," she stated a claim under *DelCostello*..

2. The opinions below did not take the allegations and all reasonable inferences that could be drawn as true nor did they construe the complaint in the light most favorable to the employee, and where the District Court never looked at whether there were sufficient facts from which bad faith or arbitrary union conduct could be inferred, the Court of Appeals should have remanded to allow the District Court to make those findings

For more than four decades, courts have looked at unfair representation claims to see if they contained sufficient facts from which arbitrary, bad faith or discriminatory union conduct could be reasonably inferred. Such claims are deemed insufficient if they fail to specify facts showing a union's lack of good faith. 48A Am. Jur. 2d Labor and Labor Relations §3309, at 505. The rationale is that pleadings must go beyond conclusions and state facts sufficient to raise the presumption that there has been unfair

representation. *Field v. Local 652, UAW AFL-CIO,* 148 N.W.2d 552, (Ct. of Appeals, Mich. 1967), at 555-556. In *Conley v. Gibson,* at 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L. Ed. 2d 80 (1957) the Supreme Court accepted factual allegations from which hostile discriminatory union conduct could be inferred, at 355 U.S. 41, 46, 78 S.Ct. 99, 102, 2 L. Ed. 2d 80 (1957). In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 559, 96 S. Ct 1048, 1054 (1976), the Court of Appeals had found sufficient facts in the record from which bad faith or arbitrary conduct could be inferred.

Whether a bargaining representative has acted fairly, impartially and without hostile discrimination depends on the facts of each case. *Balowski v. International Union.*, 372 F.2d 829 (6th Cir. 1967), at 834. It has been held that plaintiff stated a cause of action where allegations in the complaint "created an inference" that the union's processing of his grievance was perfunctory. *Kaftantzis v. D & L Transport Co.*, 531 F.Supp. 566 (1982), at 570-571. ("While hardly a model for the future, the instant complaint alleges sufficient facts so that it can be inferred that the union made no good-faith effort [...] On the face of the complaint, it does not appear beyond doubt that plaintiff can prove no set of facts that would entitle him to relief.") In *Jenkins v. United Steel Workers of America,* 522 F. Supp. 80 (E.D. Pa. 1981), at 86-87, the court concluded that "viewing the facts most favorably for the plaintiff, it may be inferred that the Union's conduct in handling the Jenkins grievance was arbitrary -- an inference sufficient to preclude summary judgment." In *Sweeney v. Hiltebrant,* 373 F.2d 491, 493 (6th Cir. 1967), the court held that no cause of action is stated if the complaint lacks any allegation "from which the existence of any hostile discrimination may reasonably be inferred." In *Sudderth v. Alreco Metals, Inc.*, 839 F.Supp.

1267, 1273. (W.D. Mich. 1993), the court reviewed material outside the complaint, including the brief, for facts and allegations of an improper motive.

Accordingly, where the District Court did not make findings on whether the union breached its duty of fair representation, those determinations should be made by the District Court on remand. *Ely v. Hall Motor Trans. Co.*, 590 F.2d 62 (3rd Cir. 1978), at 66; n.10, at 66. In that the District Court did not review submissions and did not draw inferences therefrom, the Court of Appeals should have remanded to allow the District Court to make those findings.

3. As "primary guardians of the duty of fair representation," under *Czosek v. O'Mara*, the courts should have construed the complaint to avoid dismissal and, if defective, "at the very least" given plaintiff the opportunity to amend the pleadings

By construing the complaint in favor of dismissal and failing to "at the very least" ensure the opportunity for supplemental pleadings, the Court of Appeals departs from settled precedent set forth in *Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct 770, 25 L.Ed.2d 25 (1970), at 27, 90 S. Ct 772.

Fair representation claims are to be liberally construed. *Abrams v. Carrier Corporation*,, 434 F.2d 1234, (2d Cir. 1970), at 1251, and technical accuracy in pleading is not required. See 51A C.J.S. § 750, at 1082.

Under notice pleading, the courts have consistently disfavored dismissal of complaints for lack of specificity. In *Czosek v. O'Mara*, 397 U.S. 25, 90 S. Ct 770, 25 L.Ed.2d 25

(1970), at 27, 90 S. Ct 772, the Supreme Court sustained a complaint that alleged a violation of the duty of fair representation only in general and conclusory terms:

> "As the Court of Appeals indicated, 'where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed to avoid dismissals and the plaintiff at the very least should be given the opportunity to file supplemental pleadings, unless it appears "beyond doubt" that he cannot state a cause of action.' "

The obstacles to affirmance of dismissal for failure to state a claim are formidable, *Retana v. Apartment, Motel, Hotel & El. Op. U. Loc. No. 14*, 453 F.2d 1018 (9th Cir. 1972), at 1022-1023, finding a complaint adequate under the "generous standards" of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L. Ed. 2d 80 (1957).

Dismissal for insufficiency as a pleading is proper only when the complaint affirmatively discloses "some insuperable bar to relief." *Id.* Other means less drastic than dismissal . . . can be used to clarify the theory and basis for the cause of action. *Gentry v. United Slate, Tile & Const. Roofers, etc.* 319 N.E.2d 159, 162 (Ct. of Appeals, Ind. 1974), (action under LMRA § 303, 29 U.S.C.A. 187.)

The question is whether claimants can prove any set of facts consistent with the allegations, not whether they will ultimately prevail. *In re Cendant Corp. Securities Litigation*, 39 F. Supp.2d 585 (D.N.J. 2001), at 588-589, citing *Hishon v. Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984).

Complaints need not plead law or match facts to every element of a legal theory. *Weston v. Pennsylvania*, 251 F 420 (3rd Cir. 2001), at 428-429, quoting *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103, 2 L.Ed. 2d 80 (1957):

> "Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and other pretrial procedures ... The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits ... all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of the claim and the grounds upon which it rests..." *Id.*

Finally, a defective complaint can be cured by amending pleadings. 48A Am. Jur. 2d Labor and Labor Relations § 3312, at 506-507. *Derr v. Bright*, 297 F. Supp. 12 (M.D. Pa. 1969), at 18.; *Bailer v. Local 470, International Teamsters. Etc.* 161 A.2d 342 (Supreme Court, Pa. 1960) ("Had the appellant alleged facts that indicated ...some unreasonable conduct on the part of the Local in its handling of the case before the arbitrator, a cause of action would have been made out. Appellant may or may not be able to do so. He should be permitted, by a better statement of facts, to show an enforceable claim.")

Pursuant to all of the above, if the complaint was deficient, Morales should "at the very least" have been allowed the opportunity to amend.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Third Circuit and to reverse and remand to the District Court .

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APPENDIX A - MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 17, 2001

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2415

JESUSA MORALES,

Appellant

v.

THE P.F. LABORATORIES, INC.

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 00-cv-00150) District Judge:
Honorable John C. Lifland

Argued on June 19, 2001

Before: ALITO, ROTH, and GARTH,
Circuit Judges

(Memorandum Opinion filed July 17, 2001)

MEMORANDUM OPINION

ROTH, Circuit Judge:

This is an appeal of the District Court's grant of a FRCP Rule 12(b)(6) motion, dismissing an amended complaint. Appellant Jesusa Morales sought the District Court's intervention to overturn an arbitration award, pursuant to § 301 of the Labor Management Relations Act (LMRA). The District Court held that Morales failed to allege any facts to support a claim that her union breached its duty of fair representation during the grievance proceedings related to the termination of her employment for sabotage. For the reasons that follow, we will affirm the District Court.

Morales was employed by P.F. Laboratories from September 1969 until her termination in August 1998 for sabotage. During her employment, Morales was a member of Local 825 of the International Chemical Workers Union, and was subject to the provisions of a collective bargaining agreement (CBA) between P.F. Laboratories and the Union. Pursuant to the CBA, employees may be terminated for just cause, and disputes regarding an employee termination are subject to mandatory grievance procedure and arbitration. The CBA specifies that the "decision of the arbitrator shall be final and binding" on all parties.

Morales' amended complaint cites § 301 of the Labor Management Relations Act and alleges that she was terminated without just cause and that the Union "failed to use its best efforts to obtain and present witnesses and documentary evidence . . . favorable to Plaintiff's position." The District Court dismissed the Amended Complaint pursuant to Rule 12(b)(6) because it did not allege that the

Union acted in an arbitrary, discriminatory, or bad faith manner or that the arbitration was a sham.

Morales argues on appeal that dismissal of the LMRA § 301 claim was improper because the complaint contained allegations of inadequate union representation, supported by statements in her brief. Our standard of review is plenary.

Under § 301, to state a breach of the duty of fair representation, a plaintiff must allege that the union acted in an arbitrary, discriminatory, or bad faith manner, which seriously undermined the arbitration process. *See DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 165 (1983); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567 (1976); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Vosch v. Werner Continental, Inc.* 734 F.2d 149, 154 (3d Cir. 1984). Or, a plaintiff must allege that the grievance procedure afforded her was a sham or substantially inadequate. *Vosch*, 734 F.2d at 154.

Morales argues that she properly stated a LMRA § 301 claim by alleging that the Union failed to submit evidence within its possession regarding findings of an on-site determination that showed the incident never occurred and that would have led to a different result. This argument fails because the decision by Morales' personal attorney and her Union attorney not to submit evidence or present witnesses are properly construed as strategic choices, and "mere disagreements over tactics and strategy" do not evidence conduct prohibited by § 301. *DeFillippes v. Star Ledger*, 872 F. Supp. 138, 141 (D.N.J. 1994). Further, even assuming that the Union was negligent in failing to submit evidence or call certain witnesses, the Union's negligence or

poor judgment does not establish unfair representation. *Findley v. Jones Motor Freight Div. Allegheny Corp.*, 639 F.2d 953, 958 (3d Cir. 1981) (even union's negligence or poor judgment is insufficient to support a claim of unfair representation).

Because the complaint does not specifically allege bad faith motives or sham, or even contain allegations which would support such a claim, it was proper for the District Court to dismiss the case for failure to allege inadequate representation under LMRA § 301.

Morales argues that the District Court was bound by principles of federalism to follow the holding in Hines and other cases outside this jurisdiction. We hold that the District Court did not err.

The District Court was not bound to follow the holding in *Hines*, or in any other case cited by Morales, since none of the cases are directly on point. In the cases cited, there was evidence that the Union's representation was in bad faith. (*Hines*, 424 U.S. at 569-70), or perfunctory. *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) (union's representation was perfunctory where its presentation at arbitration lasted 15 minutes and union made "little effort to rebut company's evidence.") However, as we discuss above, Morales has failed to allege that her Union's conduct was arbitrary, discriminatory, or in bad faith, or even that it was perfunctory.

Morales finally argues that the Union failed to "fairly represent her" by not arguing that there was a public policy exception prohibiting the termination of long tenured

employees for first offenses. As the District Court correctly noted, the Arbitrator considered Morales' tenure with P.F. Laboratories and the fact that this was her first disciplinary action. Despite these facts, the Arbitrator concluded that the "very seriousness of the Grievant's offense (i.e. sabotage) totally justifies her termination from employment." Because the arbitrator did consider her long tenure, this final argument also lacks merit.

Accordingly, the judgment of the District Court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

By the Court,

/s/Jane R. Roth

Circuit Judge

APPENDIX B JUDGMENT THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED JULY 17, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2415

JESUSA MORALES,

Appellant

v.

THE P.F. LABORATORIES, INC.

Appeal from the United States District for Court
the District of New Jersey
(D.C. Civil Action No. 00-cv-00150)
District Judge: Honorable John C. Lifland

Argued on June 19, 2001

Before: ALITO, ROTH, and GARTH, Circuit Judges

JUDGMENT

This cause came to be heard on the record before the United States District Court for the District of New Jersey and was argued on June 19, 2001;

On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered August 4, 2000, be and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia M. Waldron

Acting Clerk

Dated: July 17, 2001

APPENDIX C - NOTICE OF APPEAL DATED AUGUST 10, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Original Filed Aug. 15, 2000
File Number. 2:00-150 (JCL)

JESUSA MORALES,

Plaintiff,

NOTICE OF APPEAL

v.

THE P.F. LABORATORIES, INC.

Defendants

Notice is hereby given that Jesusa Morales, the plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the order granting defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12 (b) 6 entered in this action on the 4th day of August 2000.

/s/ Margaret Kleinman

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APPENDIX D - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, DATED AUGUST 4, 2001

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FILED: AUG. 3 2000
ENTERED: AUG. 4 2000

JESUSA MORALES,
Plaintiff-Appellant

CIVIL ACTION
NO. 00-150 (JCL)

v

MEMORANDUM
AND
ORDER

THE P.F. LABORATORIES, INC.
Defendant-Appellee.

LIFLAND, District Judge

Presently before the Court is defendant's motion to dismiss plaintiff's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, the motion is granted.

BACKGROUND

Jesusa Morales ("Morales") was employed with P.F. Laboratories, Inc. ("P.F.") from September 1969 until she was terminated on August 26, 1998. (Am. Compl. ¶ 4.) During her employment, Morales was a member of Local 825 of the International Chemical Workers Union ("Union") and was subject to the provisions of a collective bargaining agreement between P.F. and the Union ("CBA", attached to Original Compl. As Ex. A[1]). Prior to termination, Morales was a Senior Chemist. (Am. Compl. ¶ 4.)

Pursuant to the CBA, employees may be terminated for just cause. (Art. 6, §1.) According to the CBA, disputes regarding an employee termination are subject to a mandatory grievance procedure (Art. 11, §2.) If no agreement is reached through the grievance process, the dispute proceeds to arbitration. (Art. 6, §1.) The CBA specifies that the "decision of the arbitrator shall be final and binding" on all parties. (Art. 11, Arbitration, §3.)

The Amended Complaint contains the following factual allegations: On August 20, 1998, P.F. suspended Morales for sabotaging an experiment of a co-worker by turning off a pump on a machine on June 24, 1998. (Am. Compl. ¶ 7.) She was terminated on August 26, 1998. (Am. Compl. ¶ 7.) The Union filed a grievance on behalf of Morales challenging her discharge, and arbitration hearings

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[1] No exhibits are attached to the Amended Complaint. The Court assumes that the exhibits referred to are those attached to the Original Complaint, i.e., the CBA and the Arbitrator's September 7, 1999 Opinion and Award. Because these documents are part of the plaintiff's pleadings, it is proper for this Court to consider them on a 12(b) (6) motion.

were held between P.F. and the Union on March 24, April 29, and May 25, 1999. (Am. Compl. ¶ 12.)

Union counsel and Morales' personal attorney (Patricia Talbert) challenged P.F.'s decision to terminate Morales at the arbitration. (Arb. Op., attached as Ex. B to Am. Compl.) The following question was presented to Arbitrator William DiCindio: "Was the Grievant, J. Morales, discharged for just cause under the [CBA] and, if not, what shall be the remedy?" (Arb. Op. at 2.) DiCindio upheld the discharge, finding that Morales' termination did not violate the CBA because she was terminated with just cause. The Arbitrator stated that based on his ruling on a credible eyewitness' account of Morales' actions on June 24, 1998. (Arb.Op. at 19.) The Arbitrator also stated that he discredited Morales' own testimony because it was "riddled with inconsistencies and laced with contradictions." (Arb.Op. at 19.)

Morales' Amended Complaint cites §301 of the Labor Management Relations Act, §29 U.S.C. 185 ("LMRA"), as the basis for federal subject matter jurisdiction. Morales' Amended Complaint alleges that she was terminated without just cause and that the Union "failed to use its best efforts to obtain and present witnesses and documentary evidence...favorable to Plaintiff's position." (Am. Compl. ¶ 15.) Morales alleges that the Union should have, but failed to, take the following actions: (1) submitting evidence of an on-site demonstration of the machine in question that allegedly would have exonerated plaintiff; (2) requesting that P.F. produce a software system that allegedly would have indicated the true cause of the machine's malfunction (3) challenging P.F.'s claim that plaintiff's sabotage destroyed test data required to be submitted to the FDA; (4) requesting

that P.F. produce documents relating to an FDA audit resulting from plaintiff's sabotage; (5) objecting to P.F.'s claim that plaintiff had "tampered with a consumer product"; (6) calling a management witness to testify regarding documents produced by P.F.; (7) calling the shop steward to discredit testimony of the eyewitness; (8) requesting that the Arbitrator use a clear and convincing (rather than the preponderance) standard of proof; (9) arguing that just cause allowed the Arbitrator to use progressive discipline: (10) arguing that other employees should have been disciplined for not reporting an incident of sabotage; (11) objecting to testimony regarding a separate incident which did not allegedly involve plaintiff; (12) objecting to P.F.'s claim that plaintiff had wrongly removed a P.F. document from work; (13) moving for reconsideration of the arbitration award or to vacate the award; (14) objecting to the alleged violation of public policy arising from the Arbitrator's "failure to abide by the practice of not terminating an employee where the conduct is unproven or for a first offense by an employee with a long service record"; (15) introducing documents regarding plaintiff's "exceptional achievements"; and (16) responding to P.F.'s claims that Morales had failed to assist other co-workers. (Am. Compl. ¶¶ 16-28.) Plaintiff seeks "all damages available under law, attorney's fees and costs, and such other relief as the Court deems proper and just."

In support of its motion to dismiss, P.F. argues that plaintiff has failed to state a cause of action for breach of the duty of fair representation by the Union. P.F. argues that plaintiff's Amended Complaint fails as a matter of law because it does not allege that the Union acted in an arbitrary, discriminatory or bad faith manner. P.F. further argues that plaintiff fails to allege the arbitration was a sham. P.F. requests attorney's fees and costs related to the instant

motion. Plaintiff opposes P.F.'s motion but does not request leave to amend.

STANDARD OF REVIEW

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, matters of public record, and undisputedly authentic documents if the plaintiff's claims are based upon those documents. See Pension Benefit. Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1996 (3d Cir. 1993). In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. See Warth v. Seldin, 422 U.S.490, 501 (1975). If, after viewing the allegations in the complaint in the light most favorable to the plaintiff, it appears beyond doubt that no relief could be granted "under any set of facts that could be proved consistent with the allegations," a court shall dismiss a complaint for failure to state a claim. See Hishon v. King & Spalding, 467 U.S. 96, 73 (1984).

DISCUSSION

An individual employee represented by a union whose employment dispute is submitted to arbitration pursuant to a collective bargaining agreement generally may not challenge the merits of that arbitration award. See Vosch v. Werner Continental, Inc. 734 F.2d 149, 154 (3d Cir. 1984) (dismissing for failure to state a claim). However, there is a well-established exception that allows an employee to challenge an arbitration award when the employee claims that his or her union breached its duty of fair representation during the arbitration at issue. See id. Another exception is a

§ 301 claim alleging that the arbitration process was a "sham, substantially inadequate or substantially unavailable." Id. (citation omitted).

1. Duty of Fair Representation

To state claim for breach of the duty of fair representation, a plaintiff must allege two elements: (1) that the union acted in an arbitrary, discriminatory, or bad faith manner, and (2) such conduct seriously undermined the arbitration process. See DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 165 (1983); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); Vaca v. Sipes, 386 U.S. 171, 190 (1967); Vosch, 734 F.2d at 154. See also Findley v. Jones Motor Freight Div. Allegheny Corp., 639 F.2d 953, 958 (3d Cir. 1981) (holding that a claim merely alleging negligence or poor judgment by a union is insufficient to support a claim of unfair representation); Medlin v. Boeing Vertol Co., 620 F.2d 957, 961 (3d Cir. 1980) (holding that "it is essential that plaintiffs allege a bad faith motive on the part of the union"). "[M]ere disagreements over tactics and strategy" will not support a claim for breach of the duty of fair representation. DeFillippes v. Star Ledger, 872 F.Supp. 138, 141 (D.N.J. 1994) (dismissing plaintiff's claim and upholding arbitration decision that found employee was discharged for good cause). A union must be allowed a "wide range of reasonableness" so that it may perform effectively, but a union's discretion is still required to be exercised in "good faith and [with] honesty of purpose." Hines, 424 U.S. at 563-64 (citations omitted).

Morales' Amended Complaint fails to allege that the Union's conduct was arbitrary, discriminatory, or carried out

in bad faith. Because such an allegation is necessary to a claim of breach of the duty of fair representation, the Court must dismiss Morales' Amended Complaint for failure to state a claim. Without any allegation of arbitrariness or discriminatory or bad faith motive, plaintiff's allegations amount to nothing more than a laundry list of ways that plaintiff believes her case in arbitration should have been presented. Without more, plaintiff has alleged only "mere disagreements over tactics and strategy" (DeFillippes v. Star Ledger, at 141), and not a claim of breach of the duty of fair representation.

2. Arbitration process

"[C]ourts are not authorized to reconsider the merits of an arbitration award even though the parties may allege that the award rests on error of fact or on misinterpretation of the contract" unless the arbitration process is a "sham, substantially inadequate or substantially unavailable". United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 36 (1987) (stating that "courts play only a limited role" in reviewing labor arbitration decisions and that "courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts"). Where binding arbitration has been chosen by an employer and union, courts "should defer to the tribunal chosen". Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563 (1976). So long "as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Misco, 484 U.S. at 38. However, an arbitration award may be overturned if the award is procured through

fraud or the arbitrator's dishonesty (see id. at 36); if the award is "entirely unsupported by the record"; reflects a "manifest disregard" of the contract; or if the award contravenes a well-defined public policy. See Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1291 (3d Cir. 1996).

Plaintiff does not allege that the arbitration award she is challenging was procured through fraud or the arbitrator's dishonesty. Plaintiff mainly argues that the Arbitrator made erroneous factual determinations. This Court cannot and will not revisit the Arbitrator's fact finding unless the Court is convinced that the arbitration process was somehow tainted or improper. See United Paperworkers Int'l Union v. Misco, Inc. 484 U.S. 29, 38 (1987).

Plaintiff's attacks on the arbitration process are indirect, couched in her allegations that the Union breached its duty to fairly represent her. Plaintiff alleges that the Union's failure to fairly represent her contravenes public policy:

> The award was invalid under the "public policy' exception involving public safety. The union did not object to the arbitrator's failure to abide by the []practice of not terminating an employee where the conduct is unproven or for a first offense by an employee with a long service record nor to his admitted failure to consider the Plaintiff's long service record.

(Am. Compl. ¶ 26.) However, it is clear from the Arbitrator's Opinion, attached to the Complaint, that the Union did urge the Arbitrator to consider Morales' long service record:

> Throughout the presentation of its case, the Union repeatedly brought up the Grievant's 29 years of service and her unblemished employment record. Certainly, this is commendable and an Arbitrator usually considers such factors when determining the severity of the penalty. However, this is not a usual case and the very seriousness of the Grievant's offense [i.e. sabotage] totally justifies her termination from employment.

(Arb. Op. at 26, emphasis in original.)

Also, within the context of faulting the Union for failing to file a motion for reconsideration of the award or to vacate the award, plaintiff alleges that the arbitrator was acting outside the scope of his authority:

> The union did not submit a motion for reconsideration and did not act to vacate the arbitrator's award, although it was invalid: The arbitrator exceeded the scope of the collective bargaining agreement by relying on a vice-president's own definition of sabotage calling for summary dismissal, which was not in the agreement nor part of a written policy known to the workers.

(Am. Compl. ¶ 24.) These allegations do not state a claim that the arbitration award should be vacated because the arbitration process was tainted or improper. Rather, with these allegations, plaintiff's Amended Complaint challenges only the Union's representation of her at the arbitration.

This Court has already held that plaintiff has failed to allege a necessary element of the claim of breach of the duty of fair representation, i.e. discriminatory, bad faith or arbitrary behavior by the Union. Therefore, plaintiff has not stated a §301 claim either with regard to the Union's representation nor with regard to the integrity of the arbitration process.

3. Attorney's Fees and Costs

P.F. prays for attorney's fees and costs incurred in this motion, but P.F. presents no argument justifying such an award. Therefore, P.F. will not be awarded fees and costs incurred with respect to the instant motion.

Accordingly, **IT IS** on this 3rd day of August 2000 **ORDERED** that plaintiff's Amended Complaint will be dismissed in its entirety.

/s/John C. Lifland

John C. Lifland
United States District Judge

APPENDIX E - OPINION AND AWARD OF ARBITRATOR, DATED SEPTEMBER 7, 1999

NEW JERSEY STATE BOARD OF MEDIATION
50 PARK PLACE – 7 TH FLOOR
NEWARK, NEW JERSEY 07102

Case No. 98-415

- -

In the Matter of the Arbitration Between :

P.F. LABORATORIES, INC. :

-EMPLOYER-

: OPINION AND AWARD

and

:

I.C.W.U., LOCAL 825

:

-UNION-

- -

ARBITRATOR: William J. DiCindio, designated as neutral Arbitrator pursuant to the Rules and Regulations of the NEW JERSEY STATE BOARD OF MEDIATION

HEARING DATES: March 24, 1999 – April 29, 1999 – May 25, 1999

APPEARANCES: For the Employer

Carmine A. Iannaccone, Esquire

For the Union

Patricia M. Talbert, Esquire
Jesse Strauss, Esquire

OPINION

This proceeding arose as the result of P.F. Laboratories, Inc., (hereinafter called the Employer) discharging Jesusa Morales (hereinafter called the Grievant). This action was protested by the Grievant and I.C.W.U., Local 825 (hereinafter called the Union). Subsequent thereto, a grievance was filed on behalf of the Grievant, alleging a violation of the terms and conditions of the Collective Bargaining Agreement (hereinafter called the Agreement) dated June 10, 1997.[1]

Hearings were held on March 24, April 29, and May 25, 1999, at the offices of the New Jersey State Board of Mediation, located in Newark, New Jersey. At such hearing, the Parties were represented as shown by

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[1] Joint Exhibit No. 1

the above appearances and were afforded a full opportunity to present evidence, both oral and written, examine and cross-examine witnesses under oath, and otherwise to present, in full, their respective arguments and proofs. Post-hearing briefs were submitted by the Parties.

This Opinion and its accompanying Award are based on the record thus constituted.

THE ISSUES

Was the Grievant, J. Morales, discharged for just cause under the Agreement, and, if not, what shall be the remedy?

DISCUSSION

The Employer is engaged in the manufacturing and distribution of pharmaceutical products from its facility located in Totowa, New Jersey. At the time of her discharge on August 27, 1998[2], the Grievant was employed as a senior chemist at the Totowa facility. After denial of the grievance by the Employer, the Parties further attempted to resolve this dispute, but to no avail. It was the above set of facts which precipitated these proceedings.

The Employer argues that the Grievant was discharged for just cause under the Agreement. It further alleges that the Grievant's misconduct was in violation of Plant Regulations as outlined in the Agreement. It also contends that the willful and intentional destruction of company property does constitute just cause for discharge under the Agreement. It argues that the Grievant engaged in

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2 Joint Exhibit No. 2

an intentional act of sabotage of the operation that was being performed in the Quality Control Laboratory (hereinafter called the QCL). It contends that the clear and credible testimony of an unbiased fellow Union member will show that the Grievant engaged in an act of sabotage upon a co-worker's experiment and testing of a pharmaceutical product in the QCL. The Employer also contends that it must be able to rely upon the honesty and integrity of its chemists and the Grievant's misconduct constitutes a very serious breach of trust which cannot be condoned, or tolerated in the workplace. Finally, the Employer requests that the discharge be upheld and the grievance be denied.

The Union argues that the Grievant was not discharged for just cause under the Agreement. It contends that the Grievant did not intentionally, or deliberately commit any act of sabotage on any piece of equipment and vehemently denies any wrongdoing on the part of the Grievant. It argues that the Employer cannot sustain its burden of proving the charge against the Grievant. It submits that the Grievant is a twenty-nine (29) year employee with an unblemished record. Finally, the Union requests that the grievance be upheld and the Grievant be reinstated with back pay.

The relevant provisions of the Agreement read as follows:

ARTICLE 6 – DISCHARGE OF EMPLOYEES

"Section 1. The Company will not discharge any employee except for just cause..."

ADDENDUM 'B'
PLANT REGULATIONS

"5. Willful or intentional destruction of

> Company property is a violation and the offender is subject to immediate disciplinary action." [3]

B. Micic is a member of the Union and appeared at the arbitration hearing under subpoena. She has been employed for over three (3) years and has been a senior chemist for one (1) year and three (3) months. She testified that the only difference between a Senior Chemist A and a Senior Chemist B is the rate of pay and does not see any real difference in the duties of these classifications. Micic works in the QCL. She testified that she analyses products, raw materials and processes everything. On June 24, 1998, she was working the first shift, 8:00 A.M. – 4:30 P.M., as was the Grievant. Micic stated that between the lunch hour and the afternoon break she was working on a piece of equipment known as the Spectrophotometer (hereinafter called the Spectro).

Micic testified that two (2) other chemists, Jose Morales, Vicki Deftalinska and herself attempted to work on a Spectro in her area of the QCL and she (Micic) told them that while previously working on Senokat tablets she noticed that the calibration expired on that equipment. Micic suggested that they go to the back of the QCL and use that Spectro, because she had to use it later on and wanted to see how it worked. She testified that when they got to the Spectro in the back of the Lab, they could not find out how to use it and could not find any written information on it use. Jose then called his wife, the Grievant, who is a Senior Chemist A, and asked her to come over and help them. Micic stated that the Spectro was on the left corner of the table (marked X) and she (Micic) was standing there, with J.

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[3] Joint Exhibit No. 1

Morales on her right and V. Deftalinska on his right. [4] Micic testified that when the Grievant came over to where they were standing, she passed behind them and she (Micic) saw the Grievant put her finger on a button of another piece of equipment and pushed that button (marked O)[5] She stated that sometime after this happened they went on break because it was around 2:45 p.m.

Micic testified that she did not speak to the Grievant, or anyone from management about the Grievant pushing that particular button. She stated that when she came back from her break, she heard from employees in the QCL, that Mr. Spingler's experiment and machine had been shut down. Micic said that she then realized that the Grievant hit the switch and still didn't say anything to anybody that day or afterward. She testified that it was about one (1) week later when they had a meeting and Management told them about the machine being turned off and what happened. She stated that when Management left, the Union International Representative stayed with the Union members in the QCL, and asked if anybody knew anything about any incidents of sabotage and shutting down the equipment, they should come forward and tell the Union. Micic said the Union Representative was very upset and said if you saw what happened, you should report it. Micic testified that it was shortly thereafter when the Grievant stood up and started blaming other people, the production people, who came up to the QCL and do work as our (Chemists) machines. Micic said when she heard the Grievant say this, "I was very upset". Micic still didn't say anything at the meeting about what she saw the Grievant do on June 24, 1998.

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4 Employer's Exhibit No. 1 (photo)

5 Employer's Exhibit No. 1 (photo)

Micic testified that after the meeting, she told several Union co-workers including V. Deftalinska, R. Desai and E. Frank that she (Micic) saw the Grievant turn off the machine, but still didn't report anything to management, because she did not want to get involved. Micic acknowledged that she is a B Chemist and receives approximately $5.00 per hour less than A Chemists, because A Chemists are the more senior employees in the plant. Micic testified that she, "never resented, or thought about the difference in pay". She doesn't recall having discussions about A and B pay rates and never complained to the Union. Micic stated she may have said that she thought it to be unfair, but that was it and cannot remember to who she may have said that. B. Micic also acknowledged that after being interviewed by investigators about a month later, she signed a statement. She said that at the same time, she was being interviewed, someone was typing the statement and she signed it on that day. She stated that they just asked her questions and she answered them. She testified that she had no ill will towards the Grievant and is not afraid of Filipinos. Micic further stated that she was interviewed three (3) times during the investigation and during the first interview, she denied knowing anything about the incident, or who may have shut down the equipment. Micic stated that the Grievant usually knew all the machines and was usually called upon to help other employees. She added, "She is the best chemist. She knew all machines how to use." Micic stated that there was nothing blocking her view when she saw the Grievant push the button that shut down the machine.

J. Spingler has been employed for about two (2) years and had been promoted to a Methods Improvement Chemist approximately one (1) year ago. Before becoming a Methods Improvement Chemist, he was in the Union and neld the position of Bench Chemist. Presently, Spingler is not in the Union and the Methods Improvement Chemist

position is not in the bargaining-unit. He testifies that he spends 80%-90% of his time in the QCL. As a Methods Improvement Chemist, he transfers methods from research to QCL and trains other chemists on the use of those methods and also on the use of specific instrumentation to execute those methods. He stated that it is also his duty to introduce and experiment with new methods. Spingler has been involved in chemical work and research and development for approximately eighteen (18) years.

He stated that he has worked the first shift since he became a Methods Improvement Chemist, but works longer than eight (8) hours. He said that he knows the Grievant and never had any confrontation with her. He stated that on June 24, 1998, they were transferring new methods from TPW to the QCL for a product called Tramodal, a prescription painkiller. He testified that new methods were developed and were being converted to a robotic system. He (Spingler) was transferring those methods to the QCL and implementing the apparatus, a sample preparation system, or work station. TPW stands for Tablet Preparation Workstation. The witness than identified the Schematic of a TPW system and all the components that were being used as a complete system on June 24, 1998.[6] He also took the photos already in evidence and confirmed that the photographs accurately reflect the way the equipment was set up on June 24, 1998.[7]

Spingler testified that the HPLC consists of a pump, detector and a computer. The TPW-2 (the robot) does the sample preparation and is the computer that controls the

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[6] Employer's Exhibit No. 3

[7] Employer's Exhibit No. 1 and No. 2

robotic actions through software programming. The detector connects the system. He stated that the computer knows to start acquiring data by a signal it gets from the detector, which is transmitted from the robot. He said for everything to work they have to be set up in sequence. He said that the HPLC pump system allows the vehicle of the compound that you have injected through your robot (an enclosed system like tubing). It carries it to the detector where the signal is received. He testified that the HPLC pump is an integral part of the system and must be working to operate the system, because if it's not, the sample would never reach the detector. This was the set-up on June 24, 1998. He testified that if the HPLC pump was not operating on June 24, 1998, he could not perform the experimental work that needed to be done on that day. On June 24, 1998, they were running an assay and determining levels of specific compound in the granulation and in the tablet. Spingler also identified another photograph he had taken and marked by name each component of the TPW-2 robotic system as it is set-up on June 24, 1998.[8] He also marked and identified another photograph as the view of the TPW workstation, which is referred to as the robot.[9]

Spingler further identified another photo as the HPLC pump and detector. He also marked the toggle switch for turning the HPLC pump on and off manually.[10]

Spingler testified that he was successful in setting up the experiment that was running on June 24, 1998 and he periodically monitored its progress. He stated that sometime

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8 Employer's Exhibit No. 4

9 Employer's Exhibit No. 5

10 Employer's Exhibit No. 6

after 2:00 P.M., he went to check the system and noticed that it was not running. He saw the Chromatogram that was in the data acquisition system was getting nothing but a flat baseline, which indicated a problem with the system.[11] This happened at approximately 2:10 P.M.[12] and the HPLC pump had been shut off. Spingler had no idea what had occurred and asked an electrician who was on site, if there were any blackouts, or brownouts that had occurred during that time. The electrician indicated that everything was okay. Spingler stated that he then asked L. Gukham, another Methods Improvement Chemist, if he had seen anybody in the area, or around the equipment and the latter said he did not see anybody. He testified that he didn't report it to management on that day, because he wasn't sure what had happened. Spingler stated that he had to set everything up again and begin running samples where he had left off and later that day, it seemed to be running okay.

He testified that on June 25, 1998, he had set up the system and was running two strengths of that particular drug and was more vigilant in monitoring the system. Before he left for lunch a little after 12:00 P.M., everything was running fine. Spingler stated that he saw the Grievant in the lunch room and that she had left about 5 or 10 minutes after he had gotten there. Spingler was in the lunch room until 1:00 P.M. When he returned to the QCL, he went over to check all of the instruments and the data acquisition system was rebooted. He stated that there is a button on the computer system, which can turn it on or off and that is how

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11 Employer's Exhibit No. 7

12 Employer's Exhibit No. 8

to reboot the system.[13] When this happens, you cannot collect any data and no data is being transmitted, or stored. Spingler testified that he felt it was very odd that he had a problem on June 24, 1998, and June 25, 1998, and for totally different reasons. He said he checked the message board on the millennium system and it indicated a power failure and disruption. He said that if someone pushed the button on and off on the computer, you would have a power failure. Spingler testified that the Grievant was in the QCL when he returned from lunch on June 25, 1998. He testified that he had to set up the system again to finish what he had been doing. He had no problems after the June 24, 1998, and June 25, 1998 incident. He said that he still did not report it to management, because he was still pretty clueless as to what happened and couldn't determine the reasons for the problem.

Spingler testified that it was later on when one of the Bench Chemists, R. Desai, came up to him and said she knew someone who witnessed somebody turning my instruments off. A day later, V. Deftalinska, came up to Spingler and also told him of someone turning his machine off. Spingler testified that he reported what happened to Management and he was asked to write a memorandum for J. Hane, the Senior Director, regarding the incidents on June 24, 1998, and June 25, 1998.[14] He stated that sometime between June 25, 1998 and July 7, 1998 (date of Spingler's memorandum to J. Hane) there was a meeting called by Management and Union representatives were also present to discuss prior incidents in the QCL. Spingler said that after his conversations with Desai and Deftalinska, he felt the June 24, 1998 and June 25, 1998, incidents had to do with

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[13] Employer's Exhibit No. 4

[14] Employer's Exhibit No. 10

someone tampering with his equipment. Spingler acknowledged that he has no evidence that the Grievant did anything with regard to his experiment on June 25, 1998. He also acknowledged that the down time on June 24, 1998 and resetting the instruments took over one (1) hour and there was no damage to the machinery. He further stated that the test they were performing was important, because it would validate the method for use in a Quality Control environment.

D. Centrone is Vice President for Corporate Quality and is responsible for maintaining corporate quality for P.F. Laboratories' research affiliates in the United States. The QCL reported to him during June, July and August of 1998. He testified that he knows the Grievant quite well and she reported to R. Connor, who was the Director of Quality Control. Centrone has been an employee for 39 years. The Employer manufactures and sells prescription and over-the-counter products. It is regulated by the Food and Drug Administration (hereinafter called FDA), the State Board of Health of New Jersey (hereinafter called SBHNJ) and the Drug Enforcement Agency (hereinafter called DEA). There are specific legal regulations which govern the manufacturing of the products that the Employer sells. These regulations are codified in the Code of Federal Regulations and are commonly known as Current Good Manufacturing Process (C.F.R. Section 211). These regulations have the force and effect of law. Centrone testified that the QCL has one of the prime functions in the entire company and they are in a sense the arbiter of whether a product may go forward or not. The results of QCL tests and the ability to perform these test are paramount to this function.

Centrone stated that he is familiar with the experiment that Spingler was performing on June 24, 1998.

He said that the robotic instruments were installed by the manufacturer and used for content uniformity, where you must procure evidence that these analyses demonstrate consistency and uniformity to specifications. The robotic equipment was designed to do this automatically, and Mr. Spingler was assigned to accomplish the Employer's end of the method, because the method originated in research. Spingler's assignment was to demonstrate that what was developed by research could be reproduced in the laboratory and is required by the FDA. The TPW-2 is the controlling mechanism for the robotics and the HPLC pump are required to carry out the overall function.

Centrone further testified how any sabotage of Spingler's work would effect the Employer and its relationship with the FDA. He stated that whenever there is a failure of any event in the experiment that is going to be used to support an application to the FDA, there is a requirement to investigate that failure, or discrepancy. The FDA also looks at it, if there is a deficiency, or something wrong with the system.

Centrone testified that the Employer purchased the robotic equipment in order to ease the workload in the QCL. That type of work when done manually is very labor intensive and requires a lot of overtime. The purchase of the robotic was to ease that overtime. He stated that the Employer also feared that people in the QCL would get burned out because of the demands in production and distribution. The robotic was also purchased to ease the pressure on the QCL.

He stated that sabotage is a most serious offense, because it indicates a breach of trust and all the work

performed in a pharmaceutical laboratory is based on trust. He said that the Employer looks for the highest integrity in their people because the day-to-day generated data is what they must rely upon. There is no second chance. He said there was a time where the Employer received complaints about sabotage from Union employees. Centrone testified that he is copied on a letter by a Senior Chemist that his operation had been sabotaged and this raised serious safety concerns.[15] Upon receipt of this letter and the seriousness of recent events, Centrone called two (2) meetings. One with the QCL supervisors in an attempt to investigate the facts surrounding that event. Centrone stated that this was a very serious incident and they just had the events of the Spingler experiments around the same time. The second meeting was with the entire lab staff and Union representatives, including an International Representative. The Union had a separate session after the joint meeting. The Union leadership was also made aware of the July 7, 1998 letter of the Senior Chemist and the incident involved in the Spingler experiments. The Union did actively participate in the joint meeting. The Grievant was in attendance. Centrone told the audience that he was very concerned about the health and safety of every employee and how these disruptions are affecting business, causing investigations, affecting morale, etc. He stated that the Employer was so concerned about the safety issue, it hired a professional investigation firm (Kroll Associates) to get to the heart of the matter. Centrone testified that based on the investigation and its results, a decision was made to terminate the Grievant. The evidence produced in the investigation revealed that B. Micic had in fact seen the Grievant shut off the instrument intentionally, which caused us to go back and review everything around

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[15] Employer's Exhibit No. 11

that instrument as far as crossover validation. He said that this was a most serious breach of trust.

Centrone testified that management had considered the Grievant's twenty-nine (29) years of service and her unblemished record and sort of agonized over it. He stated that the seriousness of her offense and the breach of trust could not be tolerated in the work place. He said the most important issue is the health and safety of the public and its employees, and the Employer's responsibility to put out a product of the highest quality. Centrone testified that management could never trust the Grievant again after the evidence produced by the Kroll Associates' investigation. Centrone said the Grievant denied any act of sabotage.

P. Imperiale is a Human Resources Associate and has been employed for 22 years. She testified that the Grievant was suspended pending decision to terminate on August 20, 1998, as a result of the Kroll Associates' investigation.[16]

W. Reid is the President of the Local Union and an employee for 22 years. He testified that the Grievant was terminated for sabotage of a machine and the Employer had an eyewitness who saw her shut off the machine. He stated that at the third level grievance, the Employer gave him B. Micic's statement during her second interview when she said that she saw the Grievant shut the machine off.[17] Reid

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[16] Employer's Exhibit No. 13

[17] Employer's Exhibit No. 2

testified that he attended a meeting with Union and Management Representation and the entire lab staff about safety and sabotage. He said this came about after an incident with hydrogen and a letter from a Senior Chemist, about blowing up the whole laboratory. Reid stated that management was so concerned about safety, they said at the meeting, it would even consider subcontracting out the work. He stated that the Union International Vice President also voiced his concern at a separate meeting with Union members and said that if anybody has knowledge of anything happening like this, to give the Union messages of who might be doing it. The Union was concerned that employment in the QCL was going to be jeopardized by such antics. Reid couldn't recall the specific date of the meeting, but said it possibly was on June 28, 1998. Reid said the entire meeting was about the hydrogen incident. Reid said he does not go up to the QCL as part of his job but only in a union capacity, if there is a problem.

Reid stated they have a two-tier pay rate for chemists, mainly A rate chemists and B rate chemists. He said there is a $4.00 or $5.00 per hour difference in pay between the two. This two-tier rate was negotiated by the Parties in 1994 and the senior employees get the higher rate. He testified that the job descriptions of the A and B. chemists are the same. He stated that the B rate chemists have expressed their opinion about the upgrade of pay rates. Reid said he has no knowledge of any disciplinary action against the Grievant during her employment, outside of this incident. Reid acknowledged that if there were sabotage of the operations and the FDA believed the processes of the company were not sound, or the integrity of processes were doubted, the FDA could shut the operation down. Reid said this is a big

concern of the Union, because it could jeopardize the employment of the bargaining-unit. He said the Union agrees with the Employer that instances of sabotage should be dealt with very severely. Reid acknowledged that he does not know the number of chemists employed in the QCL in June, 1998.

K. Deftalinska has been employed since March 1998. She testified that is a chemist and met the Grievant in the QCL. She stated that she knows the Grievant was terminated "for sabotaging". She said she was asked questions about the Grievant by the investigators. She told them what B. Micic told her what she saw on June 24, 1998. She testified that herself, Micic and Jose Morales walked over to the Spectro and were unable to figure it out. It was then that Morales called his wife (the Grievant) over to help them out. She does not remember how they were physically positioned by the Spectro, but they were standing side by side. She was looking at the screen of the Spectro and had no idea what Micic or Morales were looking at during that time. Then the Grievant came over and joined them.

Deftalinska testified that all she remembers is that they were asking questions, trying to figure things out. She did not remember what the Grievant was doing when she came over. She does not remember what the Grievant said while she was there, or what Micic said. She was also asked if the Grievant at some point left the area of the Spectro and she responded, "I don't remember". She added, we all left and she (Deftalinska) was the last to leave. They stayed in that area 15 or 20 minutes before leaving.

The Grievant testified she had been employed for 29 years and at the time of her discharge she was a Senior

Chemist. She stated that her husband, Jose Morales is also employed by P.F. Labs. She stated that she became a member of the SWAT (Same Work Action Team) sometime in 1996, or 1997. As a member of SWAT, they would normally resolve whatever problems there were in different factories. The Grievant stated that she first became aware that she was being accused of sabotage when she received the suspension letter on August 20, 1998. She said that before her termination, no one from management ever questioned her about sabotage. She acknowledged that she was interviewed by Kroll Associates about turning off the switch on the TPW-2. The Grievant further testified that she told the investigator from Kroll Associates that she didn't know what the instrument is, or where the switch is located. She also told them that she had never been close to that instrument. She said they (Kroll Associates) never asked her any questions about the HPLC pump. She stated that when she received the report of Kroll Associates which was given to the Union, it was the first time she learned that she was being accused of sabotage that occurred on June 24, 1998. She said that she was accused of turning the switch off on the TPW-2. She stated that she does not even know what the TPW-2 looks like.

The Grievant recalled that on June 24, 1998, she was on the telephone when her husband called to her and asked if she (the Grievant) knew where the switch was on the Spectro they were working on. She said there were around three (3) people there at the time and her husband was one of them. She stated that her husband was in the middle, between Brana (Micic) and Vicki (Deftalinska) and she (the Grievant) came to the back of them, because they were all crowded up by the instrument. She further stated that she went behind her husband, put her hands over his shoulders and tiptoed to see

what they were working on and noticed that it was an instrument that she was not familiar with. She told them, "Nope, I don't know that". She said it was a split second more and she turned around and walked down to her work area. The Grievant said, "That's all that ever happened". She stated that she walked right out.

The Grievant testified that she never touched any equipment while she was in the area of the Spectro, or in that room. The Grievant acknowledged that she was one of the most experienced and knowledgeable chemists in the QCL. The Grievant also denied ever re-booting Spingler's computer on June 25, 1998.

On the third day of the hearing, The Grievant was recalled as a witness. She testified that she had experience with working on the HPLC pump. She stated that she was told by the Waters representative that on this particular HPLC which attached to the TPW-2; if you shut off the pump, a straight line will appear on the monitor.

It is evident from the foregoing, that the Employer's actions in terminating the Grievant are not violative of the Agreement. I say this for several reasons.

First and foremost, we have a credible eyewitness who saw the Grievant shut off the HPLC pump on June 24, 1998, and thereby cause a disruption in an experiment being run by J. Spingler in the QCL. The evidence reveals that the HPLC pump is an integral part of the robotic system and it must be working to operate the experiment, and if it is not working, the sample would not reach the detector. In other words, by shutting off the HPLC pump on June 24, 1998, the Grievant did sabotage the experiment being run by J. Spingler, the Methods Improvement Chemist in the QCL.

Since the Grievant vehemently denies ever shutting down the HPLC pump on June 24, 1998, the question must be asked, why does the undersigned credit, B. Micic, the eyewitness? I credit B. Micic for several reasons.

First, Micic's testimony was straight forward, forthright and without contradiction. Contrarily, the Grievant's testimony (discussed hereafter) was riddled with inconsistencies and laced with contradictions. While there is no other witness, but B. Micic who saw the grievant shut down the HPLC pump on June 24, 1998, K. Deftalinska, another union member and chemist, does corroborate Micic's testimony as to why she, Micic and J. Morales went over to the Spectro on June 24, 1998. She also corroborates that they had asked for the Grievant's help and that the three (3) of them were standing side by side, when the Grievant came over and joined them. The Grievant herself admits that her husband asked her to come over to the table where the equipment in question was set up and she did go over there where B. Micic, J. Morales and K. Deftalinska were standing. Deftalinska testified that she does not remember what the Grievant did, or said when she joined them, because she was watching the screen, she (Deftalinska) does corroborate Micic's testimony up to that point. J. Spingler testified that the experiment he was running on June 24, 1998, was periodically monitored and was successful until he went to check the system sometime after 2:00 P.M., when he noticed a problem with the system and that the HPLC pump had been shut off. Spingler's findings occurred after Micic, Deftalinska and J. Morales had summoned the Grievant over to help them and she (the Grievant) came over to the machine. Micic testified that she had a clear, unobstructed view of the Grievant pushing the button on the HPLC

pump,[18] and thereby shutting down the experiment Spingler was running at the time.

It is also important to note, that Micic did not report to anybody what she saw the Grievant do on June 24, 1998. She never told Spingler, her co-workers, the Union, or management what she saw on that day. It was a week or so later when D. Centrone, the Vice President for Corporate Quality, called a joint Management/Union meeting with the entire staff to discuss recent events in the QCL and the seriousness of sabotage. The evidence reveals that the Union had a separate meeting thereafter, where the International Vice President strongly urged its member to come forward and report the person who may be responsible. Subsequent to this meeting, Micic still did not report the Grievant's misconduct to Management, or the Union, but told several of her co-workers, including a R. Desai, Ed Frank and K. Deftalinska what she witnessed on June 24, 1998. It was sometime thereafter that R. Desai told J. Spingler that she knows someone who saw the Grievant shut his experiment down on June 24, 1998, but would not reveal her name. A day later, K. Deftalinska also told Spingler of someone seeing the Grievant turning the machine off on June 24, 1998. Spingler then reported this to J. Hane, the Senior Director and he (Spingler) was directed to write everything up regarding the incidents on June 24, 1998 and June 25, 1998 (discussed hereafter).[19] After Spingler's report, the Employer retained a Professional Investigating Company called Kroll Associates to interview all employees in the QCL and investigate the entire matter. At this time, Micic

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[18] Employer's Exhibit No. 3

[19] Employer's Exhibit No 10

had still not reported anything to either Management, or the Union of what she saw the Grievant do on June 24, 1998. Even at the first interview with Micic by Kroll Associates (weeks after the June 24, 1998 incident) she (Micic) denied seeing, or knowing anything about the June 24, 1998 incident. It was only at the second interview on July 24, 1998, when the Kroll Associates Investigators told Micic they knew she saw the Grievant on June 24, 1998, did she tell them in a statement what had happened. [20] So here we see B. Micic, a Union member and fellow chemist who appeared at the arbitration hearing under subpoena came forward one (1) month after the incident and make a statement of what she witnessed on June 24, 1998, involving the Grievant shutting down the HPLC pump.

Notwithstanding the above, the Union contends and would have the undersigned believe that the reason Micic testified against the Grievant is because she resented the Grievant and held ill-will towards her, because she (the Grievant) was a Senior Chemist A and made $5.00 per hour more than Micic, who is a Senior Chemist B. Now, if B. Micic was out to get the Grievant as the Union would have us believe and conjured up, or manufactured what she witnessed on June 24, 1998, then why would she (Micic) wait one (1) full month (July 24, 1998) until reporting it to management. Remember, it was only because R. Desai and K. Deftalinska, two (2) co-employees had told Spingler of someone seeing the Grievant switch the machine off, that the investigation was initiated. Moreover, it is not uncommon in any industry where employees in one classification feel it is unfair that another classification receives a higher rate of

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[20] Union's Exhibit No. 2

pay, where their responsibilities are similar. In this regard, there is not a scintilla of evidence in the record to show that Micic held any ill-will or hostility toward the Grievant. Certainly, these are important factors to be considered when determining the credibility of witnesses.[21] It should also be noted, that if we were to credit the Grievant's denial it would necessarily mean that B. Micic, who appeared under subpoena, conjured up and manufactured her testimony as to what had occurred on June 24, 1998, and did this with the sole objective of having the Grievant's employment terminated after 29 years of service. It would further mean that Micic appeared at the arbitration hearing under subpoena and perjured herself under oath by swearing to that which never occurred. Based on all the foregoing, would a reasonable person conclude that this is what actually had happened? I think not. Let us now examine the testimony of the Grievant.

On direct examination, the Grievant testified that she was interviewed by Kroll Associates about turning off the switch on the TPW-2 (the robotic equipment). She further stated that she told the investigators from Kroll Associates that she did not know what the instrument (TPW-2) is, or where the switch was located. She also told them she has never been close to that instrument. The Grievant was shown the TPW-2 in a photograph[22] and denied knowing that this was the TPW-2 machine. She also said the manufacturer of the equipment never called "us" in on the TPW-2, so she (the Grievant) has no knowledge of how it works. The Grievant also stated, that she does not know what the TPW-2 looks like. On the third day of the hearings, the Grievant was recalled and asked by Union counsel about the reasons a

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[21] Huron Ford Machinery, 75LA83 (1979)

[22] Employer's Exhibit No 2

flat line may occur on the monitor during the following exchange:

> "Q. What other reasons are there why a flat line may occur?
>
> A. In this particular HPLC that was attached to the TPW-2, after talking with the Waters representative, I was told that if you shut off the pump, a straight line will appear on the monitor, but in all the HPLC's that we have, once you shut off the pump, the monitor would indicate an instrument error.
>
> Q. So it is possible that one reason for a flat line is if the alliance pump is shut off?
>
> A. Yes, on this particular HPLC.
>
> Q. You also were mentioning earlier the TPW-2. Is there a relationship between a flat line and whether or not the TPW-2 is on?
>
> A. I think if you shut off the TPW-2, because it's not configured into the computer, there won't be any — a flat line will also be generated."

In addition and on cross-examination, the Grievant was shown the TPW-2 in a photograph[23] and asked:

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[23] Employer's Exhibit No 2

"Q. Did you know on June 24, 1998, that this was the robotic?

A. Yes.

Q. Okay. Did you know that the robotic was being used in connection with the HPLC pump?

A. I know that much.

Q. But you know that the robotic (TPW-2) was located at the end of the table near the HPLC pump that's described in E-2 on June 24, 1998?

A. Yes, sir."

Now, the above testimony is from the same witness who testified that she did not know what the TPW-2 looks like, or what it is and when shown a photograph of it, denied knowing that it was the TPW-2 machine. The Grievant also told investigators from Kroll Associates in her statement, "that she was never around the TPW-2".[24] Contrarily, she admitted on cross-examination that on June 24, 1998, her husband called her over to the area where the TPW-2 equipment was located and she did go over there. Again, the Grievant's testimony cannot be reconciled with the evidence.

The Grievant also testified on direct examination that Kroll Associates never once asked her about the HPLC pump. On cross-examination, the Grievant was asked the following questions:

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[24] Union's Exhibit No. 2

"Q. Since when you (the Grievant) were questioned by Kroll Associates, did they ask you about any knowledge you had about any tampering of machines at the lab?

A. Yes.

Q. What machines did they ask you about?

A. Gas chromatography and the HPLC. . .

Q. By the way, have you ever used the HPLC before?

A. Yes.

Q. You know how to turn it on and off?

A. Yes.

Q. You know what the black switch on the HPLC does?

A. Yes.

Q. It turns it on and off, correct?

A. Yes.

Q. And if you look at E-2, you see that the black switch is circled?

A. Yes."

In this regard, the Grievant also testified that she was one of the most experienced and knowledgeable chemists in the laboratory in June, 1998.

Again, and contrary to the Grievant's initial testimony, the evidence reveals that she was familiar with the equipment in question and knew that shutting down the HPLC pump would cause a disruption in whatever experiment was running on that equipment at the time. As shown above, the Grievant's testimony is riddled with inconsistencies and laced with contradictions and cannot be reconciled with the evidence in any manner whatsoever. In addition, the Grievant admitted she had removed certain documents from the Company, even though she knew that said documents were Company property and she was not permitted to remove them. She further admitted that she knew she had violated Company policy when she removed documents from the premises. Such admissions also reflect on the credibility of the Grievant.

Throughout the presentation of its case, the Union repeatedly brought up the Grievant's 29 years of service and her unblemished employment record. Certainly, this is commendable and an Arbitrator usually considers such factors when determining the severity of a penalty. However, this is not a usual case and the very seriousness of the Grievant's offense totally justifies her termination from employment. The evidence reveals that both the Grievant and the Union President concur that the offense of sabotage in the pharmaceutical industry should be dealt with most severely. Let us now discuss the seriousness of the Grievant's offense. Below are portions of a letter to the Employer's executives from a Senior Chemist (bargaining-unit employee), who has reason to believe that the Gas

Chromatography (G.C.) was intentionally tampered with in the QCL:

> "I am writing to express my deep concern over the June 25, 1998 incident involving the Gas Chromatography (G.C.) which had the potential to put P.F. Labs as well as my personal safety in serious danger. As part of my work with the machine, it was necessary that I leave the air as well as the hydrogen running over night to complete the run. When I arrived in the morning, I noticed the air was shut off while the hydrogen was not. Such a combination, if ignited, would most probably result in a severe explosion strong enough to kill me and damage the lab. This claim, aside from being basic knowledge in chemistry, has been affirmed by Dominick Centrone and Robert Mead. Since every chemist in the lab is surely aware of such a basic fact, the only possibility I see is that the G.C. was tampered with intentionally and with the knowledge of the consequences."
>
> "I cannot convey how serious I believe this situation to be. My life was seriously jeopardized, and quite possibly because of nothing more than a malicious act of any unstable coworker. My wife and two sons are very concerned about my safety. I share their belief that my work at P.F. Labs should never give rise to a situation where my health and life are in danger.
>
> "I am asking for nothing more than a thorough investigation. I have been a loyal employee of the company for 27 years and wish to keep my status as

> such. And when placed in such a situation, measures should be taken which I believe an employee such as myself deserves. Thank-you for your assistance. I look forward to hearing from you." [25]

In this regard, the Union made light of the fact that Spingler's experiment was down for just one (1) hour and then he had it up and running again. In its post-hearing brief, the Union states, "there is no testimony or documentation showing any harm that the company experienced as a result of the alleged sabotage." This does not make the Grievant's offense of sabotage any less serious. It is the breach of trust and her jeopardizing the integrity of the QCL itself that is the issue here. In the instant case, we are dealing with an industry that is closely regulated by federal and state laws, because P.F. Labs is responsible for the public safety as a result of the methods, experiments and processes they run in the manufacturing of pharmaceutical products and prescription drugs. As stated by D. Centrone, who has 39 years with the company:

> "Sabotage is a most serious offense, because it indicates a breach of trust, and all the work performed in a pharmaceutical laboratory is based on trust."

Moreover, the evidence reveals that whenever there is an incident of sabotage, failure, or discrepancy in an experiment that is to be used to support an application, there is a FDA requirement to investigate that incident. In this connection, the record also shows that if the FDA conducts an audit involving sabotage, or where the integrity of an

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[25] Employer's Exhibit No. 11

operation is at stake, it (the FDA) could shut it down. This fact is acknowledged by the President of the Local Union in his testimony on cross-examination:

> "Q. And, in fact, you're concerned because if the FDA, for example, were to not certify certain processes and procedures because they had concern about sabotage, you might even have lay-offs, correct?
>
> A. This is correct.
>
> Q. And sabotage of operations where the integrity of the very operation is at stake could result in an FDA audit; isn't that right?
>
> A. That is true.
>
> Q. And if that were to happen and the FDA were to start to suspect that the processes that were being worked on by the company were not sound and did not have the integrity, the FDA could, in essence, shut down an operation; isn't that true?
>
> A. That is true.
>
> Q. And if that were to happen, your members would lose their jobs; isn't that right?
>
> A. That is correct. (Emphasis added.)

W. Reid, the President of the Local Union also testified as follows regarding safety issues:

"Q. And the Union has gone on record as saying that sabotage is a very serious violation; isn't that right?

A. We have concerns about it, yes.

Q. And you have concerns because if someone sabotages and operation, there could be safety violations, correct?

A. Correct.

Q. People could get hurt?

A. Yes.

Q. People could get killed?

A. Yes."

The seriousness of the Grievant's offense cannot be overstated, because we are not only dealing with the loss of jobs, but the very safety and well being of the public and the employees working at the facility. It has long been held in arbitration:

> "It is axiomatic that the degree of the penalty should be in keeping with the seriousness of the offense. [26]

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[26] Capital Airlines, 25LA13,16 (1955)

In this regard, sabotage is such a serious offense that even a single act of sabotage has been found to justify the sanction of discharge, regardless of the employee's past employment record, or length of service.[27]

Normally, in discharge cases, Arbitrators are accustomed to hearing that the sanction of discharge is "a capital offense"; and the Employer must prove its case "beyond a reasonable doubt"; and "an employee with over 20 years of service cannot be terminated for her/his first offense"; and that the "past employment record of the employee must mitigate the sanction imposed", etc. etc. In this connection, it is important to note that the people who actually work in the pharmaceutical industry and are directly involved in these proceedings, including the Grievant and the Union, agree that the offense of sabotage is very serious, and that it justifies the sanction of discharge. Let us now review the testimony regarding this issue. First, the Grievant being questioned about the separate meeting called by the Union regarding the offense of sabotage:

> "Q. And at that time the employees were spoken to about instances of sabotage?
>
> A. Yes.
>
> Q. And at that time, isn't it true that the Union told you that people would lose their jobs if they were caught engaging in sabotage?
>
> A. Yes.

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27 New Power Wire and Electric Co. IBEW, Local 3. 144NLRB1089 (1963)

Q. And you agree that is *(sic)* someone commits an act of sabotage, they should lose their job, correct?

A. Yes.

Q. And you believe the company has a right to fire somebody who engages in sabotage, correct?

A. Yes." (Emphasis added)

When being questioned on integrity and trust of a QCL chemist, the Grievant testified as a follows:

"Q. You would agree that trust is an important qualification for being a QC chemist, would you not?

A. Yes.

Q. Integrity is an important qualification for someone who is a QC chemist, correct?

A. Yes.

Q. And if the company loses trust in one of its Quality Control chemists, does it have a right to fire them?

A. Yes.

Q. They have the right to fire a QC chemist they lose trust in?

A. Sure." (Emphasis added)

Regarding the issue of trust of chemists in the QCL, I believe that D. Centrone summed it up best when asked about discharging the Grievant:

"Q. Did you feel like you could trust her in the future if you reinstated her?

A. No." (Emphasis added)

Based on all the foregoing, it is clear that the termination of the Grievant's employment in the instant case is not violative of the Agreement.

Next, the Union asks the question of why of the Grievant would do such a thing when she has 29 years of service and an unblemished work record? Obviously, since the Grievant denied ever doing anything, we will never know the answer to this question. However, the question of why is not as important as whether "she did it" and the credible eyewitness testimony of B. Micic, including the inconsistencies and contradictions found throughout the testimony of the Grievant, does show by a preponderance of the evidence that "she did it".

The Union also raises the question of whether, "in the face of inconsistent facts and testimony by the company, sabotage actually occurred". "It is submitted, that the evidence is unequivocally clear (supra) the Grievant did sabotage the experiment being run by J. Spingler on June 24, 1998 in the QCL. In this connection, there is no evidence the Grievant did anything regarding the incident which occurred in the QCL on June 25, 1998 and that incident is irrelevant to the findings and conclusions herein.

Throughout its post-hearing brief, the Union continues to raise question after question in its attempt to subterfuge and camouflage the only issue (supra) before the Arbitrator. For example, we find the following paragraph in its post-hearing brief:

> "Why would Susie Morales wait until there were three eyewitnesses to her alleged sabotage? Why would she implicate her husband, one of the supposed witnesses, in the incident? Why didn't she, a senior chemist, with great independence, execute her sabotage at a secretive time during the thousands of hours she worked for the Company? Why would she jeopardize her salary, her retirement and that of her husband's? Since the company had not reported any harm which occurred as the result of the alleged sabotage, if Susie were risking her job, her reputation, her retirement, why wouldn't she make it worth her while? Why wasn't the Union told of these alleged acts? Why were the incidents of alleged sabotage not part of the expensive internal investigation conducted by Kroll?"

Again, only the Grievant can subjectively answer the majority of these questions. As to the last two (2) questions, the Union was informed of the incidents and Kroll Associates did investigate the relevant incidents in question. In fact, the Union supported the Kroll investigation and urged it's members to come forward with any information they may have regarding any acts of sabotage.

In its post-hearing brief, the Union raises numerous allegations and assertions in an attempt to refute and contradict the Employer's evidence against the Grievant.

However, these allegations and assertions cannot be substantiated in any manner whatsoever. In this regard, it has long been held that allegations, or assertions are not proof, and mere allegations unsupported by evidence are ordinarily given no weight by arbitrators.[28] Having weighed all the circumstances herein, including the excellent and tenacious presentation by the Parties, I find that the Employer's actions in terminating the Grievant were not violative of the Agreement.

Based on the foregoing and all the evidence before me, I find that the Grievant, J. Morales, was discharged for just cause under the Agreement. The grievance is denied.

A shall so award.

/s/ William J. DiCindio

William J. DiCindio
Arbitrator

September 7, 1999

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[28] Pacific Southwest Airlines, 74LA64 (1980); City of Pontiac, Michigan 73LA1083 (1979)